Norhamdan bin Abd Malek (trading as Maydan Trading) v Nur Fazura bt Sharifuddin & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-691–12 OF 2017
MOHD FIRUZ JC
6 AUGUST 2018

Civil Procedure — Pleadings — Striking out writ and statement of claim — Principles applicable — Whether clear and obvious case — Rules of Court 2012 O 18 r 19

The present application by way of encl 24 dealt with the second defendant's application to strike out the plaintiff's writ summons and statement of claim dated 16 December 2017 pursuant to O 18 r 19(1)(a), (b) and/or (c) of the Rules of Court 2012. The plaintiff was the sole proprietor of a business registered as Maydan Trading. The plaintiff avered that they own certain health and beauty products marketed under the name of Maydan including a chewable candy known as 'Q Tab' for hair, skin and nail health ('the product'). The first defendant was an actress/singer/model and the second defendant was the talent company which the first defendant was attached to. On or about August 2017, the plaintiff and the second defendant executed an agreement by way of a term sheet stamped on 17 August 2017 for the services of the first defendant to market and to endorse the product for a period of six months, commencing from 5 August 2017–4 February 2018 ('the term sheet'). Due to failure to make payment and breaches of other terms in the term sheet by the plaintiff, a dispute arose which resulted in termination of the term sheet and filling of this action. The second defendant's main contention for filing encl 24 was premised on the fact the plaintiff's product did not have the requisite 'KKM' approval.

Held, dismissing the second defendant's application (encl 24) with costs of RM3,000 subject to allocator:

(1) The issue of whether the plaintiff's product was governed under the Drugs Control Cosmetic Regulations 1984 would depend on whether the product concerned contained drugs. The plaintiff's product at the material time was not subject to registration under the Sale of Drugs Act 1952. To distinguish it, the second defendant could not produce any evidence to suggest that it did. The defendant on the other hand, had a certificate from the Ministry of Science and Technology (MeSTI) stating otherwise (see paras 9–10).

(2) As an application for striking out could only be allowed in clear and

A obvious cases hence the present case was not such a case to exercise the court's discretionary powers of striking out (see para 11).

[Bahasa Malaysia summary

B Permohonan ini dengan cara lampiran 24 berkaitan dengan permohonan defendan kedua untuk membatalkan writ saman plaintif dan penyataan tuntutan bertarikh 16 Disember 2017 menurut A 18 k 19(1)(a), (b) dan/atau (c) Kaedah-Kaedah Mahkamah 2012. Plaintif adalah pemilik tunggal perniagaan yang didaftarkan sebagai Maydan Trading. Plaintif menegaskan bahawa mereka memiliki produk kesihatan dan kecantikan tertentu yang C dipasarkan di bawah nama Maydan termasuk gula-gula yang boleh dikunyah dikenali sebagai 'Q Tab' untuk kesihatan rambut, kulit dan kuku ('produk'). Defendan pertama adalah seorang pelakon/penyanyi/model dan defendan kedua adalah syarikat bakat yang defendan pertama terikat bersama. Pada atau D sekitar Ogos 2017, plaintif dan defendan kedua menyempurnakan suatu perjanjian dengan cara term sheet yang dicop pada 17 Ogos 2017 untuk perkhidmatan defendan pertama untuk memasarkan dan untuk menyokong produk untuk tempoh enam bulan, bermula daripada 5 Ogos 2017–4 Februari 2018 ('term sheet'). Oleh kerana kegagalan untuk membuat pembayaran dan E pelanggaran terma lain dalam term sheet oleh plaintif, pertikaian timbul yang menyebabkan penamatan term sheet dan pemfailan tindakan ini. Pendirian utama defendan kedua untuk pemfailan lampiran 24 adalah berdasarkan fakta bahawa produk plaintif tidak mempunyai kelulusan 'KKM' yang diperlukan.

F **Diputuskan**, menolak permohonan defendan kedua (lampiran 24) dengan kos RM3,000 tertakluk kepada alokatur:

(1) Isu sama ada produk plaintif ditadbir di bawah Peraturan-Peraturan Kawalan Dadah dan Kosmetik 1984 akan bergantung kepada sama ada G produk berkenaan mengandungi dadah. Produk plaintif pada masa material tidak tertakluk kepada pendaftaran di bawah Akta Jualan Dadah 1952. Untuk membezakannya, defendan kedua tidak dapat mengemukakan apa-apa keterangan untuk menunjukkan bahawa ianya benar. Defendan sebaliknya mempunyai sijil dari Kementerian Sains dan H Teknologi (MeSTI) yang menyatakan sebaliknya (lihat perenggan 9–10).

(2) Sebagai permohonan untuk pembatalan hanya boleh dibenarkan dalam kes-kes yang jelas dan nyata oleh itu kes sekarang ini bukanlah suatu kes untuk menjalankan kuasa budi bicara mahkamah untuk pembatalan I (lihat perenggan 11).]

Notes

For a case on striking out writ and statement of claim, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8078.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Ng Kian Chong & Ors v Saw Seng Kee [1994] 3 MLJ 691, HC (folld)

Legislation referred to

Contracts Act 1950 s 24
Control of Drug Cosmetics Regulations 1984 regs 2, 7
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c)
Sale of Drugs Act 1952

Dzaki Ezhar (Dzaki Ezhar & Co) for the plaintiff.
Zirwatul Hanan (Azaine & Fakhrul) for the first defendants.
Emily Chong Man Yee (Seow & Assoc) for the second defendants.

Mohd Firuz J:

[1] The present application before me by way of encl 24 deals with the second defendant's application to strike out the plaintiff's writ summons and statement of claim dated 16 December 2017 pursuant to O 18 r 19(1)(a), (b) and/or (c) of the Rules of Court 2012 ('the ROC').

BRIEF FACTS

[2] The factual matrix of the plaintiff's claim are as follows:

(a) the plaintiff is the sole proprietor of a business registered as Maydan Trading. The plaintiff avers that they own certain health and beauty products marketed under the name of Maydan including a chewable candy known as 'Q Tab' for hair, kin and nail health ('product');

(b) the first defendant ('D1') is an actress/singer/model and the second defendant ('D2') is the talent company which D1 is attached to;

(c) on or about August 2017, the plaintiff and D2 executed an agreement by way of a term sheet stamped on 17 August 2017 for the services of D1 to market and to endorse the product for a period of six months, commencing from 5 August 2017–4 February 2018 ('term sheet'); and

(d) the marketing and publicity of the product is undeniable and is not disputed. Thereafter due to failure to make payment and breaches of other terms in the term sheet by the plaintiff, a dispute arose which resulted in termination of the term sheet and the filling of this action.

[3] In a nutshell, the plaintiff's cause of action against the defendants is for breach of contract.

[4] Having read and reviewed the cause papers and submissions filed by all parties for purposes of the above interlocutory application, I had on 23 July 2018, dismissed the defendants' application with cost of RM3,000.

PRINCIPLES APPLICABLE IN AN APPLICATION FOR STRIKING OUT

[5] The principles applicable in a striking out application have been clearly enunciated by the Federal Court in the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, in particular at pp 43–44 of the report, reproduced below:

> The principles upon which the court acts in exercising its powers under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. It is only in *plain and obvious cases* that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91) and this summary procedure can only be adopted when it can be clearly seen that *a claim or answer is on the face of it 'obviously unsustainable'* (*Attorney-General of Duchy of Lancaster v L&NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and the facts of the case, in order to see whether a party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). *The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under* O 33 r 2 (which is in parimateria with our O 33 r 2 of the Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (Emphasis added.)

[6] I am also guided by the decision of Abdul Malik Ishak J (as he then was) in *Ng Kian Chong & Ors v Saw Seng Kee* [1994] 3 MLJ 691 (at p 698 beginning para I), wherein the learned judge explained as to what is meant by 'no reasonable cause of action', 'frivolous and vexatious' and 'an abuse of the process of the court':

> No reasonable cause of action
>
> It is said that a reasonable cause of action would mean a cause of action with some chance of success when only the allegations in the pleadings are being considered (*Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094; [1970] 1 WLR 688 (CA)). The mere fact that the cause of action is weak, and not likely to succeed, is no ground for striking it out (*Wenlock v Moloney* [1965] 2 All ER 871; [1965] 1 WLR 1238). There are several instances where the statement of claim will be struck out and the action dismissed, eg in an action of contract if it appears that there is no contract between the parties or no contract valid in law; or a totally illegal contract; or the cause of action brought solely to obtain relief from the court which has no power to grant it; and, last but by no means least, where relief is sought on a ground in which no such relief could be obtained (see *South Hetton Coal Co v*

Haswell, Shotton & Easington Coal and Coke Co [1898] 1 Ch 465; *Humphrys v Polak* [1901] 2 KB 385; *Shaw v Shaw* [1965] 1 All ER 638; [1965] 1 WLR 537; *Wing v Burn* (1928) 44 TLR 258 and *Johnston v Johnston* (1884) 33 WR 239 (CA)).

Frivolous and vexatious

These words relate to cases which are obviously unsustainable as would amount to an abuse of the process of the court. The courts must in their judicial discretion determine whether the proceedings are frivolous and vexatious (see *A-G of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274). It is now trite law that the court will not permit a plaintiff to be ousted from the judgment seat, so to speak, except where the cause of action is obviously bad and 'almost incontestably bad' (*Dyson v A-G* [1911] 1 KB 410). The pleading must, in all the circumstances, be so obviously frivolous that to advance it forward must be an abuse of the process of the court (*Young v Holloway* [1895] P 87).

Abuse of the process of the court

It is said that the process of the court must be used bona fide and properly and must not be abused. The court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation (*Castro v Murray* (1875) 10 Ex 213).

THE COURT'S FINDINGS

[7] Having reviewed the cause papers and submissions by both parties, my findings are as follows:

(a) the plaintiff's claim against the defendants is based on the cause of action for breach of contract. Enclosure 24 is the second defendant's application to strike out the Plaintiff's writ and statement of claim pursuant to O 18 r 19(1)(a), (b) and/or (c) of the Rules of Court 2012;

(b) the subject matter of this action is the product owned by the plaintiff and marketed under the name of Maydan is a chewable candy known as 'Q Tab' for hair, kin and nail health;

(c) the second defendant's main contention for filing encl 24 is premised on the fact the plaintiff's product which the defendants are contracted to do not have the requisite 'KKM' approval;

(d) the second defendant was of the view that the plaintiff's product is governed by reg 7 of the Control of Drug Cosmetics Regulations also requires the KKM approval. In view of this, the plaintiff's product is an illegal substance which cannot form the basis of a legal and binding contract as provided under s 24 of the Contracts Act 1950; and

(e) the plaintiff on the other hand, denies that the product contains drugs. Had it been so, the plaintiff does agree that the Control of Drugs

A Regulation is applicable. In this regard, the plaintiff has at p 10 of encl 27, produced a certificate from MOSTI stating that the product concern does not contain drugs.

B **[8]** Having heard and reviewed the cause papers filed by the respective parties, I take the view that whether the issue of whether the plaintiff's product is governed under the Drugs Control Cosmetic Regulations 1984 ('the DCCR') would depend on whether the product concerned contained drugs. Regulation 2 of the said Regulations define 'Product' and 'Drug' as 'product' means:

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(a) a drug in a dosage unit or otherwise, for use wholly or mainly by being administered to one or more human beings or animals for a medicinal purpose; or

D (b) a drug to be used as an ingredient of a preparation for a medicinal purpose.

'Drug' has the meaning assigned to it in the Ordinance but does not include a herbal remedy.

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[9] As pursuant to the regulations, 'products' are divided into those which are subject to registration and those which aren't. The plaintiff's 'product' at the material time was not subject to registration under the Sale of Drugs Act 1952. To distinguish it, the second defendant cannot produce any evidence to suggest F that it did. The defendant on the other hand, has a certificate from the Ministry of Science and Technology (MeSTI) stating otherwise.

[10] As an application for striking out can only be allowed in clear and G obvious cases as propounded in the celebrated case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, in particular at pp 43–44 of the report, reproduced below:

> The principles upon which the court acts in exercising its powers under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in *plain and obvious cases* that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91) ...

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Hence, I of the view this case is not such a case to exercise my discretionary I powers of striking out.

[11] This being an interlocutory decision, the second defendant is not prohibited from pursuing this line of argument at the trial proper.

CONCLUSION

[12] For the reasons enunciated above and also after having considered the circumstance of this case and merits of this application, I dismissed the second defendant's application (encl 24) with cost RM3,000 subject to allocator.

Second defendant's application (encl 24) dismissed with costs of RM3,000 subject to allocator.

Reported by Ahmad Ismail Illman Mohd Razali